# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 28, 2014 |
| v | No. 312021<br>Wayne Circuit Court |
| EDWIN ANTHONY SMITH,<br><br>Defendant-Appellant. | LC No. 11-009710-FC |

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), for which the trial court sentenced defendant as a third habitual offender, MCL 769.11, to a prison term of 25 to 38 years. Defendant appeals as of right. We affirm.

Defendant was charged with three counts of CSC I arising out of the sexual penetration of his preteen stepdaughter. He was accused of penetrating the victim with two different sexual devices, one described as orange and the other as purple, and then performing cunnilingus on her. The police seized an orange device when they executed a search warrant, but a purple device was never found. During the early stages of the case, the prosecutor stated that the orange device would be submitted to the state police crime laboratory for DNA analysis, but this never occurred. At trial, defense counsel did not challenge the prosecutor's failure to pursue any DNA analysis of the orange device, and instead pursued a defense strategy of attacking the adequacy of the police investigation. Defense counsel vigorously cross-examined the officer-in-charge regarding the absence of any DNA analysis of the orange device and the failure to investigate other potentially exculpatory leads. Defense counsel also advanced the theory that the victim and her grandmother contrived the allegations so that the victim could live with her grandmother, who had a longstanding hostile relationship with her daughter, who was the victim's mother and defendant's wife. The jury convicted defendant of one count of CSC I for the charge of sexual penetration involving the orange object, but acquitted him of the remaining two counts.

## I. MANDATORY 25-YEAR MINIMUM SENTENCE

At sentencing, the trial court imposed a minimum sentence of 25 years, consistent with MCL 750.520b(2)(b), which requires a mandatory minimum sentence of not less than 25 years for a conviction of CSC I committed by a person 17 years of age or older against a person less than 13 years of age. Defendant now argues that the 25-year mandatory minimum sentence set

forth in MCL 750.520b(2)(b) violates the separation of powers doctrine, because it limits a sentencing court's judicial discretion to fashion an appropriate sentence. The question whether a statute violates the constitutional separation of powers doctrine is ordinarily reviewed de novo. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003); *People v Noble*, 238 Mich App 647, 651; 608 NW2d 123 (1999). But because defendant did not raise this issue below, it is unpreserved and our review is for plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012).

The separation of powers doctrine is expressed in Const 1963, art 3, § 2, which provides as follows:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

"[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45. Conversely, "[t]he authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies with the judiciary." *Hegwood*, 465 Mich at 436-437. However, "the Legislature may impose restrictions on a judge's exercise of discretion in imposing sentence." *Id.* at 440. In *Garza*, 469 Mich at 434, our Supreme Court observed:

> In various eras, and with regard to various offenses, the Legislature has chosen to delegate various amounts of sentencing discretion to the judiciary. At present, for instance, there are offenses with regard to which the judiciary has no sentencing discretion, offenses about which discretion is sharply limited, and offenses regarding which discretion may be exercised under the terms set forth in the sentencing guidelines legislation. [Citations omitted.]

The Court referenced first-degree murder, MCL 750.316, which carries a mandatory life sentence, and possession of a firearm during the commission of a felony, MCL 750.227b, which carries a mandatory two-year sentence, as examples of sentences in which the judiciary has no discretion. *Garza*, 469 Mich at 434 n 4. Thus, the only discretion sentencing courts have is that which is given to them by the Legislature. *People v Palm*, 245 Mich 396, 404; 223 NW 67 (1929); *Conat*, 238 Mich App 134, 147; 605 NW2d 49 (1999) ("For example, no violation of the separation of powers doctrine results from the Legislature's requiring a mandatory life sentence without the possibility of parole for first-degree murder.").

Applying these principles, we reject defendant's argument that MCL 750.520b(2)(b) violates the separation of powers doctrine. The statute does not violate the separation of powers doctrine simply because the Legislature chose to limit the discretion available to sentencing courts. Rather, it is clear that the Legislature permissibly may establish a mandatory sentence as punishment for an offense. To the extent that the Legislature has decided to limit a sentencing court's discretion with respect to CSC I committed by an adult against a preteen child victim, see *People v Benton*, 294 Mich App 191, 206; 817 NW2d 599 (2011) (recognizing that "[t]he

perpetration of sexual activity by an adult with a preteen victim is an offense that violates deeply ingrained social values of protecting children from sexual exploitation"), that is part of the Legislature's vested constitutional authority. *Hegwood*, 465 Mich at 440.

In support of his separation of powers argument, defendant cites Const 1963, art 4, § 45, which states that "[t]he legislature may provide for *indeterminate* sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences." (Emphasis added.) We first note that MCL 750.520b(2)(b) provides for indeterminate and not determinate sentencing, simply requiring the minimum sentence to be set at not less than 25 years, with the imposition of a maximum term of "life or any term of years." See *People v Lowe*, 484 Mich 718, 721 n 3; 773 NW2d 1 (2009) ("An indeterminate sentence is one the specific duration of which is 'not fixed by the court but is left to the determination of penal authorities within minimum and maximum time limits fixed by the court.'") (citation omitted). Regardless, Const 1963, art 4, § 45, does not prohibit the Legislature from enacting a statute requiring determinate sentencing as punishment for an offense, such as the felony-firearm statute providing for a two-year determinate sentence, MCL 750.227b, and the first-degree murder statute providing for a mandatory-life determinate sentence, MCL 750.316. *People v Snider*, 239 Mich App 393, 426-427; 608 NW2d 502 (2000). In sum, the mandatory minimum sentence of 25 years found in MCL 750.520b(2)(b) does not violate Const 1963, art 4, § 45, nor the separation of powers doctrine embedded in Const 1963, art 3, § 2.

## II. DEFENDANT'S PRO SE STANDARD 4 BRIEF

Defendant raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which warrant appellate relief.

Defendant first argues that the trial court abdicated its responsibility to control the proceedings by failing to sua sponte take action in response to the prosecutor's failure to obtain any DNA analysis of the orange device. Because defendant did not raise this issue at trial, the issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Vaughn*, 491 Mich at 654.

MCL 768.29 confers on the trial judge the duty "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." Defendant argues that the trial court violated this statute by failing to take appropriate action in regard to the prosecutor's failure to obtain DNA analysis of the orange sex object. We disagree.

This case is distinguishable from *People v Robinson*, 386 Mich 551; 194 NW2d 709 (1972), which involved the injection of highly prejudicial inadmissible evidence, and from *People v Brocato*, 17 Mich App 277; 169 NW2d 483 (1969), which involved pervasive prosecutorial misconduct throughout the defendant's trial. Defendant suggests that both attorneys and the trial court ignored the absence of any DNA analysis, but the record discloses that defense counsel actually made strategic use of the absence of any DNA analysis of the orange object. Defense counsel extensively cross-examined the officer-in-charge regarding her

failure to obtain DNA testing. The clear purpose of this line of questioning was to convey that DNA analysis of the orange object could have revealed valuable information, and that the officer failed to pursue it because she was incompetent, lax, biased against defendant, or indifferent to defendant's plight. In closing argument, defense counsel criticized the officer as "lazy, . . . uninterested in bringing forth all of the facts that may bear upon the question of someone's guilt or innocent [sic]." Under these circumstances, the trial court's failure to sua sponte address the absence of DNA evidence was not plain error. Indeed, any intervention by the trial court in this regard may have interfered with defense counsel's strategy.

Defendant also argues that the prosecutor engaged in misconduct by failing to pursue DNA testing of the orange object, and by presenting perjured testimony. Claims of prosecutorial misconduct are reviewed case by case, with the prosecutor's allegedly improper conduct being evaluated in the context of the entire record. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). However, because defendant did not object to or challenge the prosecutor's conduct at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010); *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010).

Defendant argues that the prosecutor "duped" the jury, leaving it ignorant of the fact that the orange sex object should have been analyzed for DNA. The factual premise of this argument is not supported by the record. Defense counsel's cross-examination of the officer-in-charge left no doubt that DNA analysis of the object was never obtained. The officer stated that testing would not have been helpful because of the time lapse between the alleged incident and the seizure of the object, and because the victim admitted that she had used the object herself. Defense counsel vigorously questioned the officer about the soundness of her judgment. Similarly, the officer had difficulty explaining the long delay before defendant was tested for gonorrhea. Because of the delay between the charged crimes and the seizure of the object, and the possibility that the victim may have used it herself, it appears that the results of any DNA testing would not have been either clearly inculpatory or exculpatory. However, defense counsel was able to use the absence of any testing to fuel his defense strategy of attacking the thoroughness of the police investigation.

Defendant also argues that the officer-in-charge and the prosecutor touched the orange object and other evidence without gloves, spoiling it for future DNA testing. It is not clear from the record whether anyone touched any evidence without gloves in the instances cited by defendant. The instance with the officer allows the inference that she was not using gloves, but the prosecutor's exchange with another police officer seems to indicate that the prosecutor merely opened a bag to show that officer the contents without removing them. In any event, these occurrences do not support defendant's argument that the prosecutor or the police mishandled evidence in such a manner as to deprive defendant of a fair trial. Assuming that the officer-in-charge was not using gloves when she removed the orange object from the bag, defense counsel used the opportunity to further advance his strategy of attacking the competency of the police investigation. Moreover, defendant cannot establish the requisite prejudice, assuming plain error.

The record also fails to support defendant's argument that the prosecutor knowingly presented perjured testimony. "It is well settled that a conviction obtained through the knowing

use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). "If a conviction is obtained through the knowing use of perjured testimony, it must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (citations and internal quotation marks omitted). Defendant has not identified any specific instances of perjured testimony, let alone shown that the prosecutor knowingly presented perjured testimony. Defendant's argument is based on his position that the testimony of the victim and other prosecution witnesses was not worthy of belief. It was up to the jury to determine the credibility of the witnesses. *People v Cameron*, 291 Mich App 599, 616; 806 NW2d 371 (2011). On this record, there is no basis for defendant's claim that he was convicted through the use, knowingly or otherwise, of perjured testimony.

Finally, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to object to the prosecutor's misconduct and failed to present a defense. "A claim of ineffective assistance of counsel is a mixed question of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To establish ineffective assistance of counsel, a defendant must show that trial counsel's performance was objectively unreasonable in light of prevailing professional norms and that, but for the attorney's error, a different outcome reasonably would have resulted. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). The second prong, prejudice, requires that the defendant demonstrate a reasonable probability of a different outcome sufficient to undermine the confidence in the outcome that actually resulted. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that defense counsel failed to protect his rights when the prosecutor "acquiesced control of the proceedings" and failed to object to perjured testimony. Defendant accuses defense counsel of effectively abandoning his representation of defendant. The record does not support these claims. As previously discussed, defendant has not identified any perjured testimony, and he has not demonstrated any basis for objecting to perjured testimony other than his position that prosecution witnesses were not worthy of belief. Far from abandoning defendant's representation, the record discloses that defense counsel vigorously and aggressively cross-examined the prosecution's witnesses.

Similarly, we reject defendant's argument that trial counsel was ineffective for failing to object to the prosecutor's conduct, given that defendant's claims of prosecutorial misconduct are unsubstantiated. We also reject defendant's argument that trial counsel failed to take appropriate action in regard to DNA analysis of the orange sex object. As previously discussed, any DNA results were not likely to be significantly probative of defendant's guilt or innocence, yet counsel was able to use the lack of testing to reasonably pursue a strategy of attacking the competence and thoroughness of the police investigation. That strategy was not unreasonable under the circumstances.

Contrary to defendant's argument that trial counsel failed to prepare for trial and failed to plan a defense strategy, the record discloses that defense counsel pursued a multifaceted strategy of attacking the police investigation and attacking the witnesses' credibility on multiple grounds. Counsel attempted to show that the victim and her grandmother had a motive to falsely accuse defendant so that the victim would be removed from her home and could live with her grandmother, as the victim wanted. Counsel also elicited testimony that the victim was

knowledgeable about sex before the charged incident and that she engaged in other sexual behavior.

Defendant argues that trial counsel was ineffective for failing to call a certain individual as a witness. Trial counsel's decisions concerning what evidence to present and whether to call or question witnesses are matters of strategy, which this Court will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Of course, the trial strategy must be sound, and "a court cannot insulate the review of counsel's performance by [simply] calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Failure to call a witness does not constitute ineffective assistance of counsel unless it deprives the defendant of a substantial defense. *Id.* "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A defendant claiming ineffective assistance based on the failure to call a witness must provide factual support for his claim that the witness's testimony would have supported a substantial defense. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Although defendant has submitted an affidavit summarizing the proposed testimony, the affidavit does not reveal that the prospective witness had any personal knowledge of the charged sexual assault allegations. Her testimony would not have supported a substantial defense.

Defendant has failed to establish that defense counsel's representation of defendant at trial fell below an objective standard of reasonableness.

Affirmed.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot